

¹ Respondent did not dispute that claimant suffered accidental injury arising out of her employment with regard to the October 3, 2008 incident.

Claimant argued that she met her burden of proof to establish she provided timely written claim for the October 3, 2008 work-related accidental injury. And claimant further argues she suffered additional repetitive injuries performing her work activities through October 3, 2009.

The Administrative Law Judge's (ALJ) Preliminary Decision simply stated claimant was entitled to medical treatment and temporary total disability compensation for her work-related injuries. But the ALJ did not state whether timely written claim was filed for the October 3, 2008 accidental injury nor state whether claimant suffered repetitive injuries through October 3, 2009. Consequently, it cannot be determined from the Preliminary Decision which docketed claim or claims the ALJ found compensable.

Respondent requests review of the ALJ's Preliminary Decision and again argues claimant failed to provide timely written claim for the October 3, 2008 accidental injury. Respondent further argues claimant failed to meet her burden of proof that she suffered any additional accidental injury arising out of and in the course of her employment with respondent.

Claimant again argues that she met her burden of proof to establish she provided timely written claim for the October 3, 2008 work-related accidental injury. In the alternative, claimant further argues she suffered additional repetitive injuries performing her work activities through October 3, 2009.

The issues for Board determination are: (1) whether claimant filed timely written claim for the October 3, 2008 accidental injury (Docket No. 1,048,943); and, (2) whether claimant suffered accidental injuries from a series of repetitive traumas through October 3, 2009 (Docket Nos. 1,048,944 and 1,048,545).²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a mental health aide at Osawatomie State Hospital. In the course of her employment on October 3, 2008, a patient attacked claimant and injured her right wrist. Claimant prepared a written accident report on the day of the incident. The next day claimant called respondent's human resources representative and requested

² This Board Member is mindful the respondent's brief indicates the parties stipulated that Docket No. 1,048,944 is not compensable. But the administrative file does not contain any such stipulation, the preliminary hearing indicated all three claims were being litigated, and the application for review also lists all three dockets.

permission to seek treatment for her injuries. She was directed to the emergency room at the Miami County Hospital. She received pain medication and an order for occupational therapy. And as claimant compensated for the injury to her right wrist she developed problems with her left wrist. Claimant later wanted go to a different doctor. She testified:

Q. Eventually, did you want to go to a different doctor?

A. Yes.

Q. And who was that?

A. Dr. Moore.

Q. And had you treated with Dr. Moore before?

A. Yes, I have.

Q. When you decided that it might be appropriate to go to Dr. Moore, what steps did you take?

A. I called my HR representative to get approval.

Q. And who is your HR representative?

A. Um, it's -- we had two of them during the time. Hammond Perry, I think.

JUDGE YATES: Is it Joyce Hammond?

THE CLAIMANT: Yeah, Joyce Hammond Perry.

Q. (By Ms. Fisher) All right. Why did you consult with Ms. Perry about going to Dr. Moore?

A. Before we can have any medical treatment of any kind and have the state pay for it, it had to be approved by her.

Q. Okay. So was it your intent through that conversation to request that the state provide medical compensation or medical treatment to you and pay for it?

A. Yes.³

Treatment with Dr. Moore was approved by respondent and the doctor provided claimant with splints but later Dr. Moore performed surgery removing a right dorsal carpal

³ P.H. Trans. at 8-10.

boss of claimant's third CMC joint in February 2009. Dr. Moore released claimant at maximum medical improvement on April 24, 2009. By claimant's last day of work on November 21, 2009, the pain in her hands was so bad she felt she was putting herself and her co-workers at risk. Claimant further testified that since she stopped working her symptoms have not improved.

Claimant testified that the pain in her hands did not go away after the October 3, 2008 incident and after Dr. Moore's surgery she continued to experience the same amount of pain in her hands. Claimant further testified that she told all of the treating physicians that the pain in her hands has persisted since the October 3, 2008 incident. Drs. Divelbiss, Guinn, Eidelman and Moore all noted that claimant has suffered from bilateral arm and hand pain since the October 3, 2008 incident. Conversely, Dr. Ketchum noted the prevailing factor in the right wrist pain was the October 3, 2008 incident and other subsequent altercations with patients and that her repetitive work re-exacerbated her right carpal tunnel syndrome. Dr. Ketchum also noted that claimant's left upper extremity problems are from overuse after injuring the right.

Respondent argues that claimant failed to make timely claim for the October 3, 2008 accidental injury. The written claim statute, K.S.A. 44-520a(a), provides in part:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

Where the employer furnishes medical treatment to an injured worker the statutory period for serving a written claim is tolled until the date treatment ceases and if respondent then relies upon the 200 day claim statute it must have told the injured worker that no further treatment would be provided.⁴

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.⁵ The same purpose or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-

⁴ Blake v. Hutchinson Manufacturing Co., 213 Kan. 511, 516 P.2d 1008 (1973).

⁵ Craig v. Electrolux Corporation, 212 Kan. 75, 82, 510 P.2d 138 (1973).

520.⁶ Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. Another purpose of the written claim statute, therefore, is to require the employee to make a positive claim in writing, that he or she desires to recover under the Workers Compensation Act.⁷ But a written claim for compensation need not take on any particular form so long as it is in fact a claim.⁸

In *Fitzwater*⁹, the Kansas Supreme Court described the test as follows:

In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

The Board considers the Supreme Court's opinion in *Ours*¹⁰ to be instructive.

The written claim required by K.S.A. 1972 Supp. 44-520a to be served upon the employer under the Workmen's Compensation Act need not be signed by or for the claimant. *The written claim may be presented in any manner and through any person or agency. The claim may be served upon the employer's duly authorized agent.*¹¹ (Emphasis Added).

The claimant testified that she filled out an accident report and provided it to respondent. Respondent's human resources representative, Joyce Hammond-Perry then faxed to the Kansas Health Policy Authority a copy of the accident report and a facsimile cover sheet. Mr. Kollin, an adjuster for Kansas Health Policy Authority, received the written documents and understood the documents were for the purpose of claimant requesting compensation for her workers compensation injury. Mr. Kollin testified:

Q. And you knew that the client, Tamara Ross, wanted this handled as a workers' compensation claim, i.e., her bills paid by the Kansas Health Policy Authority?

⁶ *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

⁷ *See Ricker v. Yellow Transit Freight Lines, Inc.*, 191 Kan. 151, 379 P.2d 279 (1963).

⁸ *See Ours v. Lackey*, 213 Kan. 72, 515 P.2d, 1071 (1973).

⁹ *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

¹⁰ *Ours v. Lackey*, 213 Kan. 72, 515 P.2d 1071 (1973).

¹¹ *Id.* at Syl. ¶ 4.

A. Yes, I would assume so.¹²

Moreover, the authorized treating physician sent a letter to Mr. Kollin dated December 23, 2008 and requested that the surgery scheduler at Dr. Moore's office be contacted to authorize surgery for claimant.¹³ Mr. Kollin testified that the letter was requesting payment and authorization for claimant's surgery. The doctor's written letter is a request for payment and is a claim for compensation. This Board Member finds claimant provided timely written claim for compensation for the accidental injury she suffered on October 3, 2008 (Docket No. 1,048, 943). And she has met her burden of proof to establish that she needs additional medical treatment for the injuries suffered in that accident. Accordingly, the ALJ's award of medical treatment and temporary total disability compensation is affirmed as to Docket No. 1,048,943.

But based upon the preponderance of the medical evidence at this juncture of the proceedings, this Board Member further finds that the testimony of Drs. Divelbiss, Guinn, Eidelman and Moore is more persuasive than Dr. Ketchum. And that claimant's continued complaints of pain are the result of her injury suffered on October 3, 2008, and not due to repetitive trauma suffered as she continued working after that date.¹⁴ Consequently, this Board Member finds claimant failed to meet her burden of proof to establish she suffered accidental injury in Docket No. 1,048,944 and Docket No. 1,048,545.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁶

WHEREFORE, it is the finding of this Board Member that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated April 20, 2011, is modified to reflect claimant has met her burden of proof that she provided timely notice of her October 3, 2008 accidental injury but is otherwise affirmed as to the award of medical and temporary total disability benefits for Docket No. 1,048,943. The Preliminary Decision is

¹² Kollin Depo. at 29.

¹³ Kollin Depo., Ex. 5.

¹⁴ See *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

¹⁵ K.S.A. 44-534a.

¹⁶ K.S.A. 2010 Supp. 44-555c(k).

further modified to reflect claimant failed to meet her burden of proof to establish she suffered repetitive trauma injuries in Docket No. 1,048,944 and Docket No. 1,048,545.

IT IS SO ORDERED.

Dated this _____ day of June, 2011.

DAVID A. SHUFELT
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Brent M. Johnston, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge